Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

COMMENTS OF CONTINENTAL CABLEVISION, INC.

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OFFICE OF THE SECRETARY

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Continental Cablevision, Inc. ("Continental") submits these Comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") contained in ¶¶ 560-563 of the Commission's Report and Order ("R&O") in this docket, FCC 93-177 (released May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993).

The FNPRM seeks comment on whether the Commission, in calculating presumptively "reasonable" benchmark rates for regulated cable television services and equipment, should ignore or discount the rates charged by cable systems which serve less than 30% of the homes in the franchise area. FNPRM at ¶561-63. According to the Commission, excluding the rates charged by these low penetration systems from its analysis "would produce a competitive rate differential of approximately 28%," R&O at ¶ 561, instead of the approximately 10% rate differential derived when the rates for low penetration systems are included. R&O at ¶ 560. As demonstrated below, excluding or discounting such low penetration system rates is contrary to the plain language of the 1992 Cable Act, and legislative intent. Moreover, established antitrust principles and Continental's actual experience with low penetration systems support Congress' conclusion that such systems do not have undue market power. The correct and responsible course of action for the Commission is to adhere to the plain language of the statute and abandon the proposed rulemaking.

I. INTRODUCTION

The entire premise of Section 623 of the 1992 Cable Act is to identify communities in which cable television systems are is deemed to have market power, and then to check any possible abuse of that power. Section 623 specifically predicates rate regulation on a finding of market power (i.e., the absence of effective competition), 47 U.S.C. § 543(a)(2), as does the legislative history. H.R. Rep. No. 628, 102nd Cong., 2d Sess. at 33 (1992) (Congress believed that a minority of cable operators abused their deregulated status and their marketpower and unreasonbly raised the rates they charged subscribers). The Commission's parallel regulation of the rates charged by common carriers reflects the same concern with market power as the justification for cable rate regulation. See, e.g., Competitive Carrier Rulemaking (First Report & Order), 85 FCC 2d 1, 20-22 ¶¶55-59 (1981) (subsequent history omitted). Although in our separate petition for reconsideration we take issue with the mechanism chosen by the FCC in implementing across-the-board cuts, the Commission's Report & Order is at least based upon the statutory premise: only systems which fail to meet any of the tests for effective competition are deemed to have market power, and short of a cost of service case, those systems will be required to reduce rates to the levels the Commission sets based upon its survey of systems which do not possess market power.

II. THE STATUTE REQUIRES THE INCLUSION OF RATE DATA FOR SYSTEMS WITH LESS THAN 30 PERCENT PENETRATION

Continental differs with the Commission on how basic and satellite tiers should be regulated within the framework of Section 623. In no case, however, is the Commission given authority to rewrite the statute. In regulating basic service, the FCC must protect subscribers from rates in excess of rates charged in markets with "effective competition". 47 U.S.C. § 543(b)(1). In establishing regulations for basic service, the FCC must "take into account" the rates of systems with "effective competition". 47 U.S.C. § 543(b)(2)(C). In setting standards for satellite tier rates, "the Commission shall consider" several criteria, including the rates charged by similarly situated cable systems in markets without "effective competition". 47 U.S.C. § 543(c)(2)(A). The explicit statutory commands do not allow the FCC to consider only rates charged in markets with overbuilds or otherwise to take into account only rates in those markets where the Commission subjectively believes rates are sufficiently low.

The plain language of the statute prevents the Commission from discounting or excluding the rates of systems in low penetration markets when analyzing the difference between rates in competitive and non-competitive markets. The term "effective competition" is defined to exist in three instances, including where "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system." 47 U.S.C. § 543(l)(1)(A). A franchise with such low penetration is subject to "effective competition" by the express terms of the statute, and the Commission has no authority to disregard the statutory language. American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir.), cert. denied, 485 U.S. 959 (1987). Just as the Commission adhered to the plain language of the statute throughout the R&O, such as limiting basic to a single basic tier, or requiring itemization of bills, R&O at ¶¶ 169, 552, it must also effectuate the plain language of the statutory definition of "effective competition."

The Commission cannot discount or exclude from its benchmark comparison the rates for systems with low penetration for the same reason it cannot declare that low penetration systems are rate regulated. The legislative standard is the same, and the Commission has already effectuated this standard in rule Section 76.905, which dictates when regulation will replace market forces (through franchising authority certification of regulation for basic rates, or through complaints regarding tier rates). It would be irrational for the Commission to decide that market forces which are adequate for purposes of measuring market power in low penetration markets are inadequate for use in comparing the rates in regulated markets with the rates in statutorily competitive markets.

The Commission suggests that excluding from its analysis the rates of systems with low penetration "may produce a better measure of competitive rate differential." FNPRM at ¶ 561. The suggestion is that Congress was wrong in its conclusions regarding low penetration markets. There is simply no statutory, empirical or rational basis for the Commission to exclude or discount the rates of systems with low penetration in its calculation of benchmark rates.[1/] The proposed rulemaking should be abandoned.

III. SYSTEMS WITH LESS THAN 30 PERCENT PENETRATION LACK MARKET POWER

Antitrust law confirms Congress' conclusion. The courts agree that market share of under 30 percent raises a presumption that market power is absent.[2/] "[T]here is substantial merit in the presumption that market shares below 50 or 60 percent do not constitute monopoly [or market] power." Antitrust

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1/ Indeed, it is just as likely that Congress purposefully included low penetration markets in establishing competitive rates to offset the artificially low prices that exist in overbuild markets engaged in short term price wars. Even this adjustment has failed to result in reasonable, compensatory rates under the published benchmarks.

2/ Market power has been defined as the power to exclude competition or to control price, the ability to raise price by restricting output, and the ability to raise price without a total loss of sales. II Phillip Areeda & Donald A. Turner, Antitrust Law ¶ 501 (1978). Market share is critical in determining the existence of market power. "[L]ack of any significant market share at least raises the presumption of de minimis market power." Anesthesia Advantage, Inc. v. Metz Group, 759 F.Supp. 638 (D. Colo. 1991).

Law ¶ 513.3c (Supp. 1992). Courts across the country have reached similar conclusions regarding industries as diverse as package delivery, health care provision, and liquor sales. See Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122, 129 (2d Cir. 1981) (market share below 50% is rarely evidence of monopoly power), cert. denied, 454 U.S. 968 (1981); Reazin v. Blue Cross and Blue Shield of Kansas, 899 F.2d 951, 967 (10th Cir. 1990) ("[w]hile the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%."), cert. denied, 497 U.S. 1005 (1990); Rutman Wine Co. v. E & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987) (manufacturer's control of 25%-33% of the market for wine sales within the relevant market did not have requisite monopoly power); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (approximately 70%-75% of market share constitutes market power). The FCC itself has followed this principle in deregulating MCI and U.S. Sprint, see, e.g., Competitive Carrier Rulemaking, 85 FCC 2d at 28-30 ¶¶79-84, and should not ignore this solid foundation in its treatment of cable television.

IV. CONTINENTAL SYSTEMS WITH BELOW 30 PERCENT PENETRATION

Continental's experience in its Los Angeles area systems shows a lack of market power and confirms the antitrust law presumption. In its December 1992 survey, the Commission collected rate information from approximately 60-70 franchises nationwide which it identified as having basic penetrations of less than 30%, including three Continental franchises: South Central Los Angeles, South El Monte and Hawaiian Gardens, California.[3/]

These systems' penetrations are less than half of the cable industry average (62%)[4/] and less than half the average basic penetration for Continental systems that serve 600 communities throughout the U.S. South Central is the largest of the franchises with 47,360 basic subscribers out of 186,898 homes passed as of June 1, 1993. South El Monte and Hawaiian Gardens had 985 and 860 subscribers respectively out of 4684 and 3576 homes passed as of June 1, 1993. Until Continental Cablevision acquiried the South Central franchise in 1988 as part of its acquisition of American Cablesystems, Inc., the residents of this section of Los Angeles had no cable television service.

Notwithstanding the apparent challenges this market posed, Continental built the South Central system between 1988 and 1990 at a cost of nearly $50 million. The system includes a $2 million modern customer service facility and local programming studio. The South El Monte and Hawaiian Gardens franchises were

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3/ Not included in the Commission's sample were several other Continental Los Angeles area franchises which also have basic penetration rates below 30 percent.

4/ Cable Television Developments No. 59 at 1-A (NCTA, October 1992).

built by a predecessor during the early to mid-1980's. Today, all three franchises offer consumers 52 or more channels of entertainment and information programming.

What distinguishes Los Angeles area franchises from other urban markets Continental serves is the abundance of broadcast television stations. People who reside in South Central, South El Monte and Hawaiian Gardens have at least 16 broadcast stations available to them and generally enjoy excellent over-the-air reception. This is nearly twice the number of local broadcast stations that are available, on average, to Continental's other 2.6 million subscribers. In these Los Angeles area communities, the presence of 16 or more broadcast signals is an adequate substitute for 70 percent or more of the cable market.[5/]

The effects of below 30 percent penetrations are reflected in the substandard financial performance of these systems. For example, the South Central system had operating losses of $2.675 million/year in 1992, bringing to $15.5 million the systems' total operating losses through December 31, 1992. With operating margins hovering around 20% (compared to Continental's company-wide, 1992 year-end operating margin of 44% (revenues

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5/ The impact of an abundance of local broadcast stations is also felt by Continental's other Los Angeles area systems which have achieved average penetration rates of only 42%. In contrast, excluding Continental's 317,000 Los Angeles area subscribers, the Company has achieved an average basic penetration of approximately 64%, and Forbes Magazine has described Continental's marketing efforts as "the best in the industry."

minus expenses before interest depreciation and taxes)), Continental's below 30 percent penetrated systems are not earning <u>any</u> profits, much less monopoly profits.

Continental takes pride in the fact that it has built a state-of-the-art cable system, created over 200 new jobs (96% minority employees) and made the second largest private investment in South Central Los Angeles since World War II. However, it will be many years before the South Central system becomes profitable.

Continental believes that below 30 percent penetration systems in communities like South Central Los Angeles, South El Monte and Hawaiian Gardens are among those that Congress had in mind when it established this category of systems as ones that face effective competition. The systems do not have market power, and their rates are a real-world example of the market forces facing systems that cannot excuse real or putative market power. The rates of such systems should not be excluded or discounted in the Commission's assessment of rates in competitive markets.

V. THE COMMISSION SHOULD NOT RUSH TO TAKE FURTHER ACTION THAT WILL DESTABALIZE FINANCIAL MARKETS AND THE CABLE INDUSTRY

Through its rate and other regulations, the FCC has forced a wholesale restructuring of the cable television industry, spawning great uncertainty in financial markets that are critical to the cable industry's growth and development. By proposing that it might ignore one of the statutory criteria for establishing competitive benchmarks and thereby reduce cable rates an additional 18%, the Commission has exacerbated this uncertainty. By honoring the explicit language of Section 623 and continuing to rely upon survey data regarding the rates for systems with low penetration in the calculation of "reasonable rates" for regulated services and equipment, the Commission can take a giant step toward restoring stability in the financial markets and the cable industry.

VI. CONCLUSION

For the foregoing reasons, the Commission should not adopt the proposal set forth in the FNPRM.

Respectfully submitted,

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